

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE: STRYKER REJUVENATE) Case No. 13-MD-2441 (DWF/FLN)
AND ABG II HIP IMPLANT)
PRODUCTS LIABILITY LITIGATION)
_____)
This Document Relates to) St. Paul, Minnesota
All Actions) January 26, 2016
) 2:30 p.m.

BEFORE **THE HONORABLE DONOVAN W. FRANK**
UNITED STATES DISTRICT COURT JUDGE
AND **MAGISTRATE JUDGE FRANKLIN L. NOEL**
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

STATUS CONFERENCE PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFFS:

Plaintiffs' Lead Counsel
Committee Chairperson: Meyers & Flowers
PETER J. FLOWERS, ESQ.
225 West Wacker Drive, Suite 1515
Chicago, Illinois 60606

Plaintiffs' Lead Counsel
Committee Members: Meshbesh & Spence, Ltd.
GENEVIEVE M. ZIMMERMAN, ESQ.
1616 Park Avenue South
Minneapolis, Minnesota 55404

Official Court Reporter: JEANNE M. ANDERSON, RMR-RPR
Suite 146 U.S. Courthouse
316 North Robert Street
St. Paul, Minnesota 55101

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APPEARANCES (Continued) :

APPEARANCES (Continued) :

Plaintiffs' Liaison Counsel:

Liaison Counsel to
The State Courts: Bernheim & Dolinsky, LLC
MICHAEL E. GALLANT, ESQ.
8151 Peters Road, Suite 3200
Plantation, Florida 33324

FOR THE DEFENDANTS:

Defendants' Lead Counsel:

Gibbons, P.C.
KIM M. CATULLO, ESQ.
One Pennsylvania Plaza
37th Floor
New York, New York 10119-3701

Defendants' Liaison Counsel:

Stinson Leonard Street LLP
TIMOTHY P. GRIFFIN, ESQ.
150 S. 5th Street, Suite 2300
Minneapolis, Minnesota 55402

P R O C E E D I N G S**I N O P E N C O U R T**

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3 THE HONORABLE JUDGE FRANK: You may all be seated,
4 thank you.

5 For those of you in the courtroom, other than the
6 lawyers that were in chambers and those of you on the phone,
7 the Court apologizes for -- obviously, we are not -- well,
8 we are in a different time zone than some of you, but it is
9 2:30 here, not 2:00. And so one of my -- this is Judge
10 Frank talking -- one of my character defects, not that I
11 have just one, is I talk too much. And so, if there is
12 frustration with the length of the in-chambers conference,
13 it shouldn't rest on the shoulders of the Plaintiffs or
14 Defense lawyers.

15 It was discussions that led -- in fact, it wasn't
16 Judge Noel's doing, either. It was mine. So, what we will
17 do, and I will just emphasize the same thing to counsel, as
18 Brenda Schaffer just emphasized to Judge Noel and I, that
19 with people listening in, we have to speak directly into
20 these microphones, otherwise people will not hear that are
21 listening in.

22 So, why don't we just -- we will start with the
23 Plaintiffs' side of the counsel table if you want to
24 indicate your presence for the record? And then we will go
25 over to the Defense.

1 MS. ZIMMERMAN: Good afternoon. This is Genevieve
2 Zimmerman for Plaintiffs.

3 MR. GORDON: Ben Gordon for Plaintiffs.

4 MR. FLOWERS: Pete Flowers for the Plaintiffs.

5 MS. FLEISHMAN: Wendy Fleishman for the
6 Plaintiffs.

7 MR. ZIMMERMAN: Charles Zimmerman for the
8 Plaintiffs.

9 MR. KENNEDY: Eric Kennedy for Plaintiffs.

10 MR. DeGARIS: Anthony DeGaris for the Plaintiffs.

11 MR. NEMO: Tony Nemo for the Plaintiffs.

12 MR. GALLANT: Michael Gallant for the Plaintiffs.

13 THE HONORABLE JUDGE FRANK: And shall we proceed
14 over to Defense counsel? I don't know if we should assume,
15 Judge Noel, are they kind of ganging up on the Defense
16 lawyers?

17 THE HONORABLE MAGISTRATE JUDGE NOEL: There is
18 definitely an imbalance between the --

19 MR. GRIFFIN: Tim Griffin for the Defendants, Your
20 Honor.

21 MS. CATULLO: Kim Catullo for the Defendants.

22 THE HONORABLE JUDGE FRANK: What I thought we
23 would do, and I will say one other thing before we begin and
24 go down the joint agenda items. If there are people,
25 whether they are in the courtroom or listening that are

1 frustrated about, well, how did this date get set? It is
2 being done at a different time, a different day than in the
3 past. Well, that would again -- even though my chambers
4 tried to work and coordinate, I am not claiming that any
5 particular attorney on either side requested this date or
6 time, it was rather the Court saying, well why don't we get
7 back together, because of all of the different holidays,
8 find a date -- I didn't plan on the East Coast blizzard, but
9 try to find a date just to get an update on where we are at.

10 Because as we will explain in a few minutes, part
11 of this is to coordinate as best we can with the courts
12 around the country, in addition to getting an updated
13 report. And since it had been a time, I thought that we
14 should do that. And so that is how the date was selected.
15 And then before we leave today and adjourn, I think we
16 should try to agree on the next date, as well.

17 So, with that, if we could go to the update on
18 cases filed in the MDL and the status report? And if
19 counsel both -- however you've worked this out to come to
20 the podium, that would be great.

21 MR. FLOWERS: Thanks, Your Honor, this is Pete
22 Flowers again for the Plaintiffs.

23 The first item is the update on the cases filed in
24 the MDL, Your Honor. The newly filed cases have pretty much
25 plateaued in terms of new filings. There's also a

1 significant number of cases that have been dismissed
2 pursuant to the settlement. I think we have reached kind of
3 a flat area in terms of what is there.

4 MS. CATULLO: I would agree, Your Honor. This is
5 Kim Catullo for the Defendants. We have seen -- it is just
6 a trickle in at this point of complaints, and most of the
7 new complaints are actually unrevised cases.

8 And as Mr. Flowers mentioned, we had quite a few
9 dismissals come in through the Settlement Program and we do
10 have some additional ones, as well, that will come through
11 once the process completes itself.

12 THE HONORABLE JUDGE FRANK: And I think we
13 discussed in chambers, right now we probably, if we want to
14 have an estimate of cases we have remaining in the MDL that
15 are either opt-outs or -- we will just let either counsel be
16 -- because I was going to bring it up, a ballpark idea, for
17 another reason before we conclude today.

18 MS. CATULLO: Your Honor, we don't have a precise
19 number of what the cases are out there because so many of
20 them, the huge percentage is actually unrevised. And then
21 we have also cases that are opt-outs. That is a number that
22 is well under a hundred cases. And then we do have cases --
23 it is not a huge number, we don't know the precise number,
24 but of cases where the persons did not qualify for the
25 Settlement Program because there was that 11/3/14 revision

1 date cutoff. So, the universe is primarily made up of -- it
2 is made up of those different categories of cases. And that
3 is the same, by the way, in the other jurisdictions, as
4 well.

5 THE HONORABLE JUDGE FRANK: Agreed, Mr. Flowers?

6 MR. FLOWERS: I do.

7 THE HONORABLE JUDGE FRANK: Unless there is
8 something else you intended to -- unless you have any
9 questions Judge Noel?

10 THE HONORABLE MAGISTRATE JUDGE NOEL: No.

11 THE HONORABLE JUDGE FRANK: We can go on to
12 Settlement Program status.

13 MR. FLOWERS: In terms of this, Your Honor, as you
14 know, there are well over 95 percent of the people in the
15 MDL, and in New Jersey enrolled in this process.

16 In terms of the first part of the process, the
17 super majority have received their payment and are moving
18 forward. There is an enhanced benefit part of this, which
19 is, I kind of call it, part two of the Settlement Program.
20 And that is moving along, as well, in terms of processing
21 those claims, reviewing those claims, processing those
22 claims, people receiving notice and the payments have been
23 coming forward and will continue to come forward in the near
24 future.

25 MS. CATULLO: And that is accurate, Your Honor.

1 THE HONORABLE JUDGE FRANK: We can move on to the
2 updated registration process.

3 MR. FLOWERS: So, Your Honor, this is something we
4 talked about before and this is something in place
5 previously, which requires, ultimately, each attorney to
6 register their plaintiff and identify that plaintiff has had
7 one of the products that is in this litigation combined with
8 where they are at in terms of kind of medical status, have
9 they been revised or not revised.

10 We have been talking about this, and I think it
11 would be of great benefit to our side to understand what the
12 numbers are, and also to understand that the cases that are
13 currently in here are not resolved -- or are the right
14 product. I mean, in the past, we had a number of cases that
15 turned out not to be the right product. So, we have been
16 talking about getting this process re-set up and ensuring
17 that in that process the product is identified so that we
18 are all working off the same numbers, ultimately.

19 MS. CATULLO: Your Honor, as I think you asked me
20 questions about what is on the docket, I think that is
21 probably the best way to find that out. Because just
22 looking at the complaints, I can tell you, is not an
23 accurate assessment of that.

24 We have talked about that. I think the Court
25 hasn't even urged us to do that. And we do plan on doing

1 that most likely sometime in March or April. So, we will
2 open up the registration, really, for docket management
3 reasons to know what is out there.

4 But, one thing I would urge, actually, is we did
5 learn through the Settlement Program that not having
6 accurate product identification is a real hindrance. So,
7 one of the things that Mr. Flowers and I had talked about,
8 having true product ID as part of that registration. So, I
9 think we both would urge counsel out there to start -- if
10 you don't have that, which frankly I think you should have,
11 but if you don't have it, start getting that information
12 together, primarily product labels that would show it is in
13 fact one of the products at issue in this litigation.

14 THE HONORABLE MAGISTRATE JUDGE NOEL: The question
15 I had is, do you need or are you asking for the Court to
16 issue some kind of order regarding the registration? As I
17 recall, part of the Settlement Order included the
18 registration requirement, is that correct or incorrect?

19 MS. CATULLO: Yes. We will be submitting
20 something that we will work on together. And it will
21 include, for example, this aspect on product identification.
22 So, I think we are going to take, frankly, what was used in
23 the past and just update that, but also include this
24 provision, having lived and learned on the product ID issue.

25 THE HONORABLE MAGISTRATE JUDGE NOEL: Okay, thank

1 you.

2 MR. FLOWERS: The next issue, Your Honors, is the
3 discovery update.

4 Next week a deposition is going forward of Robert
5 Tust on Tuesday and Wednesday of next week, which we have
6 noticed in coordination with several other jurisdictions,
7 including New Jersey, as well as Florida.

8 We have discussed with the Defendant and have
9 reached an agreement, and I am talking now from the MDL
10 perspective, that this will go forward. This person is a
11 significant player, I believe. And the MDL and Stryker have
12 reached an agreement that we are going to have one
13 questioner at the deposition. I think that same agreement,
14 but I will let Ms. Catullo speak to, has been reached in New
15 Jersey, as well.

16 MS. CATULLO: Your Honor, this deposition which is
17 scheduled for next week was -- originally, we also
18 negotiated the number of days. So, Plaintiffs wanted two
19 days. Defendants wanted one day. And the Defendants did in
20 good faith negotiate and agree to two days.

21 We are negotiating with the different
22 jurisdictions on the number of questioners. Obviously, this
23 can't turn into a circus, with a room that just anyone can
24 ask questions, given all of the coordination efforts here.
25 And we have reached an agreement with the MDL that there

1 will be one questioner. And my understanding is the same
2 will occur with the New Jersey group, as well.

3 We are trying to reach that with the Florida
4 group, which is comprised of attorneys with cases in other
5 jurisdictions like Michigan and Massachusetts. And we have
6 had some disagreement at this point. So, we are going to
7 continue to try to resolve that. And if we can't, then we
8 will consider other options, as well.

9 THE HONORABLE JUDGE FRANK: Well, maybe, as I
10 think Judge Noel brought up in the in-chambers conference,
11 rather than being concerned or getting -- for lack of a
12 legal phrase -- caught up in some jurisdictional issues, if
13 we know prior to the date of deposition -- unless for some
14 reason it unfortunately gets cancelled, but I don't think --
15 hopefully that would not serve anyone's best interest.

16 If we know that, we could even reach out to any of
17 the other jurisdictional Judges and say, let's agree on a
18 plan and who is going to be available, in the event you need
19 to ring one of us up. And I would predict that we could
20 probably agree on something like that to who would be
21 available. It doesn't mean we have already decided you are
22 going to need us, but sometimes that acts as a small
23 deterrent, if not a large deterrent. And it wouldn't be the
24 first time we had done something like that to coordinate
25 that to say, let's agree so that each Judge knows, well, who

1 is going to be available if there is an issue about: Well,
2 what is a Federal Judge telling a State Judge to do -- or
3 not a State Judge, but a plaintiff's lawyer in another
4 state, or vice-versa. I think we can resolve that early on
5 so you know exactly who to pick up the phone and call.

6 MR. FLOWERS: Okay, thank you.

7 MS. CATULLO: Thank you.

8 MR. FLOWERS: In terms of other discovery issues,
9 Your Honor, there's some outstanding written discovery and
10 third-party discovery that Ms. Catullo and I have talked
11 about and agreed upon some dates in the near future where
12 they are going to make these productions. So, I think we
13 are pretty much square on that.

14 They've also produced some additional custodians
15 back in December, I believe it was, of additional people
16 that we asked for. So, at least for the time being, in
17 terms of that, that's where we had the same understanding in
18 that, as well.

19 MS. CATULLO: I agree, Your Honor.

20 THE HONORABLE JUDGE FRANK: And I may have an
21 observation to make about the coordination of discovery, but
22 I will sit tight until we get down to state litigation
23 update, because I think it all kind of -- it relates to both
24 issues. So, we can move on to the next item.

25 MR. FLOWERS: Okay, Your Honor. We had filed a

1 motion, albeit yesterday, for payment for our third-party
2 vendor Providio, who handles all of our liens and was
3 actually written into the Settlement Program.

4 I understand Ms. Catullo hasn't had a complete
5 opportunity to look at the motion. And as we talked about
6 prior to walking into court, we are going to make sure she
7 doesn't have any issue, and proceed forward. But, I will
8 give her the time to review the motion before asking the
9 Court to enter it.

10 THE HONORABLE JUDGE FRANK: We will just agree
11 there won't be any delay and downtime. If that happens, we
12 will have an immediate turnaround time for it.

13 MR. FLOWERS: All right, thank you. Then I think
14 we are at State Court litigation update, Your Honor.

15 MS. CATULLO: And Your Honor, you are aware of the
16 different places that we have some of the litigation,
17 primarily in Florida, in both Broward County and Palm Beach
18 County. I know that Your Honor has reached out to those
19 Judges, and I will let the Court speak on that.

20 But, we also do have a pocket of cases in
21 Massachusetts, as well as a few in Michigan. The good news
22 is that we do have counsel from Florida who are in these
23 other jurisdictions, so there is some continuity there, as
24 well.

25 THE HONORABLE JUDGE FRANK: And I -- first of all,

1 I probably didn't say this back in chambers, I don't recall.
2 But, to the extent it would be helpful or necessary, I
3 think -- well, I don't think -- I have the names and have
4 talked to all of the Judges in each of these states with the
5 exception of Massachusetts. And I know Judge Boes in
6 Michigan. And so the other judges I am familiar with and I
7 have contact information.

8 What I will say, substantially consistent with two
9 things, two categories, I said in chambers. The first is
10 there were some -- I don't know if the right word is rumors,
11 but somebody had heard that, well, was the Court -- or the
12 Court is trying to set up a nationwide conference call. And
13 the answer is back in mid-December, early December, which
14 probably was the first mistake that we made, we were going
15 to try to set up a, just for informational purposes -- I had
16 talked to Judge Martinotti, Judge Henning, Judge Hafele,
17 Judge Boes, and we were going to -- and then we had sent out
18 some information to Judge Miller in California.

19 We are trying to set up a coordinated call where
20 all of the Judges would have been on video and/or audio,
21 audio for sure, but I think we are setting up the video, but
22 audio for sure. And then people couldn't -- to make a long
23 story short, separate from some concerns that one or more
24 Judges had that, well, how exactly -- what would we
25 accomplish by that? We weren't able to kind of get it all

1 set up. And frankly speaking, I suppose we were trying to
2 re-create what has been done in some other nationwide cases
3 over the years.

4 But that shouldn't be -- so that didn't occur and
5 that may or may not occur in the future. But, that
6 shouldn't be confused with there has been one or more calls
7 and get-togethers since the last time we were together by
8 telephone conference with the other Judges around the
9 country, with the exception of -- I am not familiar with the
10 Judge in Massachusetts.

11 And as I said back in chambers, I was glad we had
12 a couple of these calls. One, so that it wasn't known by
13 some of the courts that even they had heard the word
14 settlement in 95 percent of the cases. And so, and I said,
15 well, we still have a vested interest.

16 So, even though we promised in our Order back when
17 we stayed discovery to give expedited treatment once we got
18 to the next stage, we still haven't lost interest in trying
19 to coordinate things and see what cases are truly going to
20 be tried, because their outliers are quite different than
21 the cases in the settlement group, and what cases maybe
22 could be resolved or settled. Because, as it turns out, and
23 this was a surprise to some of the Judges who thought, well,
24 the MDL may not have the same interest anymore in the cases
25 because, quote, "settled." Well, we still have the most in

1 the country.

2 So, I said, we still have actually more incentive
3 than the rest to help coordinate discovery and see what
4 needs to be tried with truly meaningful deadlines and dates,
5 and what needs to be -- how can you rule out settlement.
6 And so, hence, the need to coordinate discovery.

7 Because, I mean, I am very straightforward. One
8 of the biggest criticisms of State and Federal Judges is, as
9 I told them, and some people blame more the Feds than the
10 States and vice-versa, is why can't you all work together
11 without compromising the rights of Plaintiffs or Defendants,
12 and save time and money for everybody and figure out what
13 truly needs to be tried? Because they are that type of
14 case.

15 So, those discussions have been going on, so I
16 don't know if there is any -- if Judge Noel has any
17 observations there. Then any, maybe, comments or
18 recommendations that counsel has today about: Well, here is
19 what we are hoping the Court will do and here is the status
20 from where we see it. Because we will continue to reach
21 out -- I have the most contact with Judge Martinotti. But
22 then I have talked to each of these Judges in the last, I
23 will say, from early December through now. I have talked to
24 him at least once. And I think we have coordinated some
25 phone calls with each of them.

1 And so, that is kind of where that is at. We will
2 continue to do that. Because I have some concern that,
3 well, if we could identify those cases that truly are those
4 outliers, and then let's get some meaningful trial dates and
5 coordinate discovery, versus, well is there a second phase?
6 Or we could move on to -- okay, now that we are here, should
7 we now be focusing some efforts on seeing the next stage of
8 mediation or settlement?

9 So, I don't want to oversimplify it from
10 Plaintiffs' point of view or Defense. And I don't know if
11 Judge Noel you have anything in that regard.

12 THE HONORABLE MAGISTRATE JUDGE NOEL: No, I think
13 we have covered it in chambers and here for now.

14 THE HONORABLE JUDGE FRANK: So, I will defer to
15 counsel if there are things that either you feel that should
16 be stated here or requesting the Court to do or not do,
17 or --

18 MR. FLOWERS: From the Plaintiffs' end, Your
19 Honor, we are not requesting anything at this stage. What I
20 would say is, we are doing our best, and I am personally
21 remaining in contact with these other lawyers from other
22 jurisdictions, attempting to make sure that this is done in
23 the most efficient manner. But, I have limitations,
24 obviously. We are trying do this in an efficient way.

25 MS. CATULLO: And I would echo that, as well. I

1 mean, everyone agrees that logically coordination makes
2 sense. And the Court has made it clear that that is what
3 should occur. I think we are all trying for that. I think
4 there are just some lines that some folks have made in the
5 sand of, I will coordinate on this, but not that. And so,
6 we are trying, but it is not completely successful.

7 THE HONORABLE JUDGE FRANK: Well, and maybe this
8 doesn't need to be said. I have said it at other hearings,
9 but I truly believe it, notwithstanding sometimes some of
10 the criticism in the cases. Well, the Federal Court comes
11 in, and it is our way or the highway. When we have these
12 get-togethers by phone, whether it is with one Judge or not,
13 or more than one, because we have had both types, that is
14 not the approach at all we are taking.

15 We are saying, let's keep each other informed and
16 please let us know what we can do to kind of promote
17 coordination and cooperation without compromising anyone's
18 right, because everybody has their responsibilities.
19 Because obviously, it doesn't work to say: My way or the
20 highway. That is rarely constructive.

21 And so, we will continue to do that. We will
22 continue to reach out. And just assume that if there is
23 something that Plaintiffs' counsel or Defense counsel feels
24 that, well, it would really be helpful if the Court would do
25 this or not do this, that you won't be bashful about

1 contacting. I don't think either one of you fit the
2 characteristic of the bashful type. And so, I don't know
3 anybody over at this table or on either side that would fit
4 that definition, either.

5 MR. FLOWERS: Okay, Your Honor, thank you.

6 MS. CATULLO: Thank you.

7 THE HONORABLE JUDGE FRANK: Miscellaneous docket
8 matters we have, and then also, let's not forget before we
9 adjourn to -- I don't think we have a date set yet for the
10 next get-together, so we will talk about that, too.

11 MR. FLOWERS: This is just cleaning up the docket,
12 Your Honor. There are some cases where the Defendant has
13 provided me a list of folks that filed cases that are not
14 the proper product. And we have contacted most of them, if
15 not all of them, in trying to get those cases into wherever
16 else they are going to go, because they are not properly
17 here. And there's some representation issues of multiple
18 people representing the same Plaintiff, which I think will
19 overall clean up the docket again. So, I just wanted to
20 bring it to your attention and say that we are working on it
21 to get it cleaner.

22 MS. CATULLO: Yeah, I agree. It is those two
23 categories: So, it is the products that don't belong in
24 this litigation; and people who have duplicate cases,
25 multiple firms.

1 THE HONORABLE JUDGE FRANK: Your view, and if you
2 need to consult one another or other co-counsel, I will
3 leave that up to you. And I don't want to create an issue
4 where there isn't one, but your view on when the next
5 get-together should be? I do think that we should set a
6 date.

7 The only issue is, well, should we do it at the
8 end of February or March? I know March is a tough time for
9 a lot of people for breaks and other issues -- or, if you
10 feel that, well, let us chat amongst ourselves and get back
11 to you in the next few days, that is fine. We will do
12 whatever works best for -- if you would rather circulate a
13 date amongst yourselves and maybe get back to us, we will
14 work with you on that, too.

15 MR. FLOWERS: Your Honor, given the multiple
16 folks, if it is okay with the Court if we could just have --
17 we will confer amongst us and then we will contact Brenda --

18 THE HONORABLE JUDGE FRANK: Oh, sure.

19 MR. FLOWERS: -- and see if we can figure out a
20 date.

21 THE HONORABLE JUDGE FRANK: That makes perfect
22 sense. Yes, I think that would be the fairest for everyone.
23 And then we will make sure we get that not just on the
24 docket, but on the website.

25 And then obviously, it goes without saying that if

1 I am reaching out to other courts or they are reaching out
2 here and we get any updates, we will get that information to
3 you. And I hope you will also get that information to us.
4 If there is something, well, we didn't know about it when we
5 were there in January, but now that we know this, it would
6 be really helpful for the Court to do this or do that, I
7 assume you will reach out to us.

8 MR. FLOWERS: Yes, we will, Your Honor. Thank
9 you.

10 THE HONORABLE JUDGE FRANK: Anything else for
11 Plaintiffs' counsel or Plaintiffs' co-counsel or anybody
12 else?

13 MR. FLOWERS: Not from us.

14 THE HONORABLE JUDGE FRANK: For Defense?

15 MS. CATULLO: No.

16 THE HONORABLE JUDGE FRANK: Well, if you had to
17 leave the East Coast and you were trying to camp out in that
18 snow, I am sorry we ruined your -- and actually I shouldn't
19 joke about such things, because a couple of you did get here
20 from the East Coast, which that is the Eighth Wonder of the
21 World, probably.

22 Unless there is anything else, I will thank you
23 all for coming to beautiful Downtown St. Paul/Minneapolis.
24 And Judge Noel?

25 THE HONORABLE MAGISTRATE JUDGE NOEL: I have

1 nothing else. Thank you.

2 THE HONORABLE JUDGE FRANK: We will stand in
3 recess and then we will come up with another date very soon.
4 All right? Thank you.

5 MR. FLOWERS: Thank you, Your Honors.

6 MS. CATULLO: Thank you, Your Honors.

7 (Adjournment.)

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15 I, Jeanne M. Anderson, certify that the foregoing
16 is a correct transcript from the record of proceedings in
17 the above-entitled matter.

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Certified by: s/ Jeanne M. Anderson
Jeanne M. Anderson, RMR-RPR
Official Court Reporter

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